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FEMTO-SEC TECH, INC.

10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION

14 FEMTO-SEC TECH, INC., a California
15 Corporation,

Plaintiff,

16
17 v.

18 BAUSCH & LOMB INC., a New York
19 Corporation,

20 Defendant.
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No. 8:15-cv-1687

**COMPLAINT FOR PATENT
INFRINGEMENT AND
DEMAND FOR JURY TRIAL**

1 Plaintiff Femto-Sec Tech, Inc. ("Femto-Sec"), by and through its undersigned
2 attorneys, pleads as follows:

3 **I. PARTIES**

4 1. Femto-Sec is a corporation organized and existing under the laws of the
5 State of California having its principal place of business in Aliso Viejo, California.

6 2. Bausch & Lomb Inc. ("Bausch & Lomb") is a corporation organized and
7 existing under the laws of the State of New York, having its headquarters in
8 Rochester, New York.

9 **II. JURISDICTION AND VENUE**

10 3. This Court has subject matter jurisdiction for this action pursuant to 28
11 U.S.C. §§ 1331 and 1338.

12 4. On information and belief, this Court has personal jurisdiction over
13 Bausch & Lomb for the reasons, among others, that (i) Bausch & Lomb transacts
14 business by selling infringing product in California, (ii) Bausch & Lomb has places of
15 business in Irvine and Rancho Cucamonga, California, and (iii) Bausch & Lomb
16 maintains an agent for service of process in Los Angeles, California.

17 5. Venue is proper in this District because (i) Bausch & Lomb resides in this
18 District within the meaning of 28 U.S.C. §§ 1391 and 1400(b), and (ii) Bausch &
19 Lomb has committed acts of infringement in this District and has a regular and
20 established place of business in this District.

21 **III. FACTUAL ALLEGATIONS**

22 **A. Dr. Neev**

23 6. Dr. Joseph Neev, President of Femto-Sec, is a physicist and an inventor
24 of revolutionary applications of lasers in the ophthalmic, dermatological, dental and
25 cardiovascular fields.

26 7. Dr. Neev's career in advancing the use of laser technology to optimize
27 surgical applications began in the late 1980s. His contributions to augment the use of
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1 lasers in medical and other applications is well-recognized in the industry, and can be
2 seen through his numerous publications and his affiliation with reputable institutions
3 such as Lawrence Livermore National Laboratory (“Livermore”), the University of
4 California at Irvine (“UCI”), the Beckman Laser Institute, the University of California
5 at San Diego, the University of California at San Francisco, Cornell University School
6 of Medicine, the University of Texas at Austin, Stanford University’s School of
7 Medicine, and Duke University’s School of Medicine. As an internationally
8 recognized leader in the field of femtosecond lasers in surgery and medicine, Dr. Neev
9 was asked, in the mid-1990’s, to organize the first conference on commercial and
10 biomedical applications of ultra-short pulse lasers and served as the conference chair
11 or co-chair for over a decade.

12 8. In the mid and late 1990s, Dr. Neev worked as an assistant professor of
13 surgery at the Beckman Laser Institute and Medical Clinic, which was part of the
14 Department of Surgery at UCI. At the time, Dr. Neev worked with other University of
15 California scientists at Livermore on research and development projects relating to
16 ultra-short pulse lasers. Livermore, which was managed by the University of
17 California at the time, is a federally funded research laboratory, entrusted with
18 strengthening the United States’ security through the development and application of
19 world-class science and technology.

20 9. Dr. Neev and his collaborators at Livermore developed foundational
21 technology relating to ultra-short pulse lasers with various applications. The Regents
22 of the University of California (“The Regents”) applied for and received various
23 patents relating to this foundational technology. Among these patents is U.S. Patent
24 Nos. 5,720,894 (the “’894 Patent”), entitled “Ultrashort Pulse High Repetition Rate
25 Laser System for Biological Tissue Processing,” which was issued by the U.S. Patent
26 and Trademark Office on February 24, 1998. Dr. Neev is a named inventor of the
27 ‘894 patent.
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1 10. Following his departure from UCI, Dr. Neev continued his research
2 concerning medical applications of laser technology. Dr. Neev's subsequent work has
3 resulted in the issuance of 15 U.S. Patents covering various laser and light-based
4 biomedical applications, including U.S. Patent No. 6,482,199.

5 **B. The Femto-LLNS License**

6 11. Dr. Neev founded Femto-Sec in or about 2007. Femto-Sec is engaged in
7 research and development in the field of ultra-short pulse lasers for medical,
8 ophthalmic, dental, and industrial applications.

9 12. In 2007, Femto-Sec invested significant funds to acquire an exclusive
10 field-of-use license to a group of patents relating to, among other things, femtosecond
11 lasers. As of August 29, 2007, Femto-Sec and The Regents, on information and belief
12 at that time the manager of Livermore, entered into a Limited Exclusive Patent
13 License Agreement for Short-Pulse Laser Technology ("the Femto-LLNS License").
14 Femto-Sec paid to license patents based on technology developed by Dr. Neev as well
15 as on technology developed by Dr. Neev's former colleagues at Livermore.

16 13. Under the Femto-LLNS License, Femto-Sec was granted an exclusive
17 royalty-bearing license under five patents related to ultra-short pulse laser technology
18 within a field of use comprising medical applications for humans and animals,
19 including medical devices and cosmetic applications, and biological treatments for
20 plants. One of those patents was the '894 Patent.

21 **C. The VICTUS Femtosecond Laser Platform**

22 14. Bausch & Lomb markets and sells the VICTUS Femtosecond Laser
23 Platform in the United States.

24 15. The VICTUS Femtosecond Laser Platform is an ophthalmic surgical laser
25 with at least the following indicated uses:

- 26 • The creation of a corneal flap in patients undergoing LASIK surgery or
27 other treatment requiring initial lamellar resection of the cornea;
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- 1 • Anterior capsulotomy during cataract surgery;
- 2 • The creation of cuts/incisions in the cornea in patients undergoing
- 3 cataract surgery or other ophthalmic treatment requiring cuts / incisions in
- 4 the cornea;
- 5 • The creation of penetrating arcuate cuts/incisions in the cornea in patients
- 6 undergoing cataract surgery or other ophthalmic treatment requiring
- 7 penetrating arcuate cuts/incisions in the cornea;
- 8 • Laser-assisted lens fragmentation of nuclear cataracts during cataract
- 9 surgery, not for fragmentation of posterior subcapsular (PSC) and cortical
- 10 cataracts.

11 16. On information and belief, the VICTUS Femtosecond Laser Platform is
12 used to selectively ablate and/or modify eye tissue.

13 17. On information and belief, the VICTUS Femtosecond Laser Platform
14 operates with a pulse duration in the approximate range from 290 femtoseconds to 550
15 femtoseconds.

16 18. On information and belief, the VICTUS Femtosecond Laser Platform
17 operates with a pulse repetition rate of 80 kilohertz (cataract surgery), or 160 kilohertz
18 (LASIK flap).

19 19. On information and belief, when the VICTUS Femtosecond Laser
20 Platform is used for an indicated use, the pulsed laser beams are directed and focused
21 to specific locations on and in a patient's eye.

22 20. On information and belief, when the VICTUS Femtosecond Laser
23 Platform is used for an indicated use, each pulsed beam forms a plasma at least in part
24 as a result of absorption of the beam's energy by eye tissue.

25 21. On information and belief, when the VICTUS Femtosecond Laser
26 Platform is used for an indicated use, the plasma generated by the interaction of a
27 beam and the eye tissue is allowed to decay.

- 1 • "*VICTUS*, the industry-leading femtosecond laser that provides
2 exceptional performance across cataract and corneal applications takes
3 versatility to a new level. This single laser platform enables surgeons to
4 perform capsulotomies, fragmentation, arcuate incisions, corneal
5 incisions, and LASIK flaps. *VICTUS* is engineered to meet the standards
6 of the clinician who truly embraces innovation."
- 7 • "The *VICTUS* platform is cleared for creation of a corneal flap in patients
8 undergoing LASIK surgery or other treatment requiring initial lamellar
9 resection of the cornea, and for anterior capsulotomy during cataract
10 surgery."

11 28. Bausch & Lomb intends that the infringing product be used in a manner
12 that infringes the '894 Patent. Bausch & Lomb obtained FDA approval for infringing
13 uses and markets the product for infringing uses. On information and belief, Bausch
14 & Lomb directly or indirectly creates and provides manuals, brochures and other
15 documentation instructing and enabling infringing uses.

16 29. Bausch & Lomb has contributed to and continues to contribute to
17 infringement of one or more claims of the '894 Patent in the United States by, among
18 others, ophthalmic surgeons performing eye surgery using the *VICTUS* Femtosecond
19 Laser Platform. The infringing product embodies a material part of the claimed
20 invention of the '894 Patent, and Bausch & Lomb knows that the product is especially
21 made or adapted for uses that infringe the '894 Patent. The infringing product is not a
22 staple article or commodity of commerce suitable for substantial non-infringing uses.

23 30. Bausch & Lomb's infringement of the '894 Patent has been and continues
24 to be willful. Bausch & Lomb has known of the '894 Patent since at least 2008.
25 Bausch & Lomb knew or should have known that the *VICTUS* Femtosecond Laser
26 Platform infringes the '894 Patent, and they have proceeded despite an objectively
27 high likelihood that a court would find the product to be infringing.
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1 31. Bausch & Lomb does not currently have nor has it ever had a license
2 under the '894 Patent.

3 32. Femto-Sec has sustained significant damages as a direct and proximate
4 result of Bausch & Lomb's infringement of the '894 Patent.

5 33. Femto-Sec will suffer and is suffering irreparable harm from Bausch &
6 Lomb's infringement of the '894 Patent. Femto-Sec is entitled to an injunction against
7 Bausch & Lomb's continuing infringement of the '894 Patent. Unless enjoined,
8 Bausch & Lomb will continue their infringing conduct.

9 34. Bausch & Lomb's infringement of the '894 Patent is exceptional and
10 entitles Femto-Sec to attorneys' fees and costs incurred in prosecuting this action.

11 **RELIEF REQUESTED**

12 WHEREFORE, Femto-Sec prays that the Court enter judgment as follows:

13 A. That Bausch & Lomb has infringed and continues to infringe the '894
14 Patent and that the '894 Patent is not invalid and is enforceable;

15 B. Awarding Femto-Sec damages adequate to compensate it for Bausch &
16 Lomb's infringement of the '894 Patent, in an amount to be determined at trial, but in
17 no event less than a reasonable royalty for the use made of the claimed inventions by
18 them;

19 C. Awarding a preliminary and permanent injunction restraining and
20 enjoining Bausch & Lomb, and their officers, agents, servants, employees, attorneys,
21 and any persons in active concert or participation with them who receive actual notice
22 of the order by personal service or otherwise, from any further manufacture, use, sales,
23 offers to sell, or importations of any and all of the products and services identified
24 above;

25 D. Trebling all damages awarded to Femto-Sec under the '894 Patent;

26 E. Finding this case exceptional and awarding to Femto-Sec its reasonable
27 attorneys' fees incurred in prosecuting its claims for patent infringement;
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1 F. Costs and interest;

2 G. Such other relief as the Court determines to be just and proper.

3
4 DATED: October 20, 2015

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15 Attorneys for Plaintiff

16 FEMTO-SEC TECH, INC

DEMAND FOR JURY TRIAL

Femto-Sec requests a jury trial for all issues triable to a jury.

DATED: October 20, 2015

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